

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
21 CVS 015426

NORTH CAROLINA LEAGUE OF  
CONSERVATION VOTERS, et al.,

REBECCA HARPER, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his  
official capacity as Chair of the House  
Standing Committee on Redistricting, et al.,

Defendants.

*Consolidated with*  
21 CVS 500085

**RESPONSE IN OPPOSITION TO NCLCV PLAINTIFFS' MOTION FOR PROTECTIVE  
ORDER QUASHING NOTICE OF DEPOSITION DIRECTED TO NCLCV COUNSEL  
OF RECORD SAM HIRSCH AND DIRECTING LEGISLATIVE DEFENDANTS TO  
STRIKE SAM HIRSCH FROM THEIR WITNESS LIST FOR TRIAL**

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Speaker Timothy K. Moore, and Representative Destin Hall (collectively, "Legislative Defendants"), by and through undersigned counsel, and pursuant to the Orders entered by this Court on November 30, 2021 and December 20, 2021 and Rules 7(b) and 26(c) of the North Carolina Rules of Civil Procedure, and oppose "NCLCV Plaintiffs' Motion for Protective Order Quashing Notice of Deposition Directed to NCLCV Counsel of Record Sam Hirsch and Directing Legislative Defendants to Strike Sam Hirsch from Their Witness List for Trial" (the "Motion for Protective Order"). Legislative Defendants respectfully show the Court as follows:

## ARGUMENT

NCLCV Plaintiffs filed a verified complaint with this Court alleging that the North Carolina General Assembly’s 2021 state legislative and congressional redistricting plans were unconstitutional on theories of partisan gerrymandering and race dilution. Their claims are premised on a comparison of the Enacted Plans to NCLCV’s so-called “Optimized Maps” that were generated by “harnessing the power of mathematics and computer science to identify” these alleged flaws. Verified Compl. at ¶ 1. Indeed, the NCLCV maps formed a basis of their Motion for a Preliminary Injunction, form the basis of the Report from their sole named expert, and even constitute the remedy that NCLCV Plaintiffs suggest this Court should adopt if certain preconditions are not met.

Yet remarkably, NCLCV Plaintiffs have worked tirelessly to shield these “Optimized Maps”—the very maps they would be happy for this Court to impose on North Carolina’s voters for the next decade—from any and all scrutiny from Legislative Defendants. This Court has already halted these obstructive efforts, issuing an Order (over their objection) compelling NCLCV Plaintiffs to produce information regarding the creation of these maps. And now that they have been forced to disclose that Mr. Hirsch, one of the lead counsel of record for NCLCV Plaintiffs, was the sole person who “directed” the creation of the “Optimized Maps,” they now ask this Court to bar Legislative Defendants from deposing the author of the “Optimized Maps” and thereby deprive them of indisputably relevant information, possessed exclusively by Mr. Hirsch, that is central to NCLCV Plaintiffs’ claims and proposed remedies. The Court should decline to shield the admitted author of NCLCV’s plans from discovery.

Legislative Defendants’ position and legal contentions that support its opposition to NCLCV Plaintiffs’ Motion for Protective Order are generally set forth in its Motion for

Clarification, or in the Alternative, Motion to Compel, filed provisionally under seal, earlier today. That Motion makes clear that Legislative Defendants' efforts to seek testimony from Mr. Hirsch clearly meet all requirements of the *Shelton* Rule, to the extent the Court finds that rule is applicable here. In the interests of judicial efficiency and the Court's convenience, Legislative Defendants hereby incorporate the arguments and contentions made in their Motion for Clarification by reference into this response. Legislative Defendants' also make the following additional observations in opposition to NCLCV's Motion:

First, NCLCV is an interest group comprised of professionals well-acquainted with litigation, and Mr. Hirsch is learned counsel with decades of experience in complex, civil litigation, and presumably well-versed in redistricting litigation. It would strain credulity to believe that the NCLCV Plaintiffs were unaware that the author of their Congressional and state legislative district maps – which they sought to impose on the voters of North Carolina – was likely to be deposed on how and why she or he drew the maps. Indeed, discovery into the rationale for how and why district lines are composed is one of the most common components of redistricting litigation. There is significant legal support for the principle that the involvement of attorneys in map drawing, even attorneys serving as counsel of record in subsequent litigation concerning redistricting processes, renders those attorneys to be fact witnesses, their documents potentially subject to discovery, and themselves subject to giving testimony. *See, e.g., Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6122542, at \*1 (E.D. Wis. Dec. 8, 2011), *order clarified*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011) (attorney's communications with legislative map drawers were not protected by the attorney-client privilege where the attorney was acting as a "consultant" rather than a representative); *Ohio A. Philip Randolph Institute v. Smith*, No. 1:18-cv-00357, ECF No. 121 (W.D. Ohio, Dec. 15, 2018)

(granting plaintiffs' motion to compel compliance with subpoenas served on an attorney after finding his communications with individuals whom he was both representing and helping draw redistricting maps were not protected by the attorney-client privilege). Accordingly, Mr. Hirsch's decision to involve himself in, nay "direct," the drawing of NCLCV Plaintiffs' "Optimized Maps" was made necessarily in full view of the risk that he may be called upon as a fact witness in subsequent litigation. Thus, NCLCV Plaintiffs cannot now invoke the structure of their litigation strategy and witness presentation or ramifications of the North Carolina Rules of Professional Conduct, which Mr. Hirsch voluntarily agreed to subject himself to in moving to appear pro hac vice, as a basis to exclude the key witness on their proposed maps.

Second, NCLCV's argument regarding the procedural mechanisms for obtaining Mr. Hirsch's testimony by depositions are a red herring. Given the extraordinarily expedited and frenetic pace of discovery, NCLCV Plaintiffs know that a requirement to obtain, domesticate, and serve a third-party subpoena on an out-of-state witness, during a holiday week, and in a jurisdiction experiencing a colossal spike in Covid infections, would be near impossible. Indeed, the Court has altered other basic procedural requirements, such as standard response periods for written discovery that were not otherwise amended by its Scheduling Order or shortened by leave of the Court, given the circumstances facing the parties in this case. As such, the Court should not be swayed by NCLCV Plaintiffs' argument on this point.

Third, ever since this Court compelled NCLCV Plaintiffs to disclose Mr. Hirsch's involvement in the creation of the "Optimized Maps," they have sought to back-peddle and downplay the role that they say the maps will play in the litigation. Their December 23 letter states that they will use these maps merely as "demonstrative" exhibits, and their pending Motion states that they "will not offer at trial any evidence or argument" about how they were created. Their

Motion even goes so far as to claim that “This case—and the two others that will be tried together with it—is about the maps enacted by the General Assembly” as if to suggest that no scrutiny of the maps they and their expert use to attack the Enacted Plans is appropriate. Their Verified Complaint, and the relief it seeks, however, remains unamended. Moreover, use of these maps as “demonstrative exhibits,” against which to compare the Enacted Plans, requires the conclusion that the demonstratives are a valid basis for comparison—that the proverbial apples being compared to apples. And that conclusion necessarily requires an understanding of the how the maps being compared were created in the first place. Who could be more necessary to give insight on that question than the sole person identified as the one who “directed” the process that created the maps?

Fourth, NCLCV Plaintiffs have conceded that Mr. Hirsch is a fact witness and that he is able to convey responsive, discoverable, factual information consistent with his obligations under the attorney client privilege and work product doctrine. On pages 8 and 9 of their Motion, NCLCV Plaintiffs acknowledge their ability to “disaggregate” facts from privileged information in interrogatory responses. If they can do so through interrogatory responses, they can do so in deposition testimony. Moreover, a deposition is likely to be far more economical in terms of attorney time than the process of drafting and responding to written discovery at this phase.

Finally, all of these reasons support inclusion of Mr. Hirsch on Legislative Defendants’ proposed witness list.

### **CONCLUSION**

WHEREFORE, for the reasons set forth above, Legislative Defendants respectfully request this Court deny NCLCV Plaintiffs’ Motion for Protective Order Quashing Notice of Deposition Directed to NCLCV Counsel of Record Sam Hirsch and Directing Legislative Defendants to Strike Sam Hirsch from Their Witness List for Trial.

Respectfully submitted, this the 29th day of December, 2021.

/s/ Phillip J. Strach

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It is hereby certified that on this the 29th day of December, 2021, the foregoing was served on the individuals below by email:

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